

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

V.

LOUIS DANIEL SMITH, also known as Daniel Smith, also known as Daniel Votino; KARIS DELONG, also known as Karis Copper; TAMMY OLSON; and CHRIS OLSON.

## Defendants.

NO: 13-CR-14-RMP

## ORDER DENYING MOTIONS TO SEVER TRIAL

BEFORE THE COURT are Motions to Sever Trial from Defendant Smith by Codefendants Tammy Olson and Karis Delong, respectively. ECF Nos. 318. Also before the Court is a motion to accept a late-filed declaration in support of the motions to sever, filed by Defendant Louis Daniel Smith, ECF No. 361, and a motion to expedite the same, ECF No. 362, which was granted in the Court's Order Memorializing Court's Oral Rulings at ECF No. 367.

## 1 BACKGROUND

2 Codefendants Tammy Olson and Karis Delong were indicted, along with  
3 Defendant Smith, on one count of conspiracy to commit an offense against the  
4 United States or to defraud the United States in violation of 18 U.S.C. § 371; four  
5 counts of delivering misbranded drugs into interstate commerce in violation of 21  
6 U.S.C. §§ 331(a) and 333(a)(2); and one count of smuggling in violation of 18  
7 U.S.C. § 545. ECF No. 1. The Indictment alleges that the Defendants engaged in  
8 a scheme to import, manufacture, and sell hazardous material that was marketed as  
9 a health product. *Id.* Specifically, the Indictment alleges that Defendants,  
10 operating through a company called “PGL International,” misbranded sodium  
11 chlorite, a harmful chemical, as Miracle Mineral Solution (“MMS”) and marketed  
12 it to the public for consumption to cure such ailments as malaria, HIV/AIDS,  
13 hepatitis, and various forms of cancer. *Id.* at 4, 7.

14 With regard to count one of the Indictment, Defendants are accused of  
15 conspiring “to obtain the chemicals needed to manufacture the drug MMS without  
16 revealing to regulators and suppliers the true purpose of the chemicals; to use those  
17 chemicals to manufacture the drug MMS in a facility that was hidden from  
18 regulators; to offer MMS for sale on websites they had established; and to enrich  
19 themselves by obtaining money from the interstate sales of the misbranded drug  
20 MMS.” *Id.* at 7. The Indictment contains numerous specific allegations as to

1 Codefendants Karis Delong and Tammy Olson's alleged involvement in the  
2 conspiracy, along with Defendant Smith and Codefendant Chris Olson.<sup>1</sup>

3 Codefendants Tammy Olson and Karis Delong filed motions to sever their  
4 trial from the trial of Defendant Smith, contending that they require access to  
5 exculpatory testimony that Defendant Smith only can provide at their separate trial.  
6 ECF Nos. 317, 318. At the Codefendants' request, the Court allowed for  
7 supplemental briefing on the Codefendants' motions to sever. ECF No. 337.  
8 Codefendants Tammy Olson and Karis Delong filed their supplemental  
9 memoranda *ex parte*. ECF Nos. 354, 355.<sup>2</sup> Codefendants explained that they were  
10 filing their memorandum *ex parte* due to their reliance on certain materials to  
11 which Defendant Smith has claimed attorney-client privilege and which have not  
12 been disclosed to the Government.

13 On July 14, 2014, after the deadline set forth in the Court's Pretrial Order,  
14 Defendant Smith filed a declaration in support of Codefendants Tammy Olson's  
15 and Karis Delong's motions to sever. ECF No. 357. The Government filed its  
16 supplemental response within the time frame set forth in the Court's Pretrial Order  
17 and argued in part that Defendant Smith's supporting declaration was not timely

18 <sup>1</sup> Codefendant Chris Olson has since pleaded guilty to one count of Shipment of  
19 Misbranded Drugs in violation of 21 U.S.C. §§ 331(a) and 333(a)(1).

20 <sup>2</sup> Codefendant Delong filed her supplemental memorandum as a separate motion,  
but the Court reviews it as a supplement to her original motion.

1 filed. ECF No. 359. The Court determined at oral argument that it would accept  
2 Defendant Smith's late-filed declaration. ECF No. 367 at 2. The Court  
3 additionally will consider a reply brief that Defendant Smith filed in support of  
4 Codefendants Tammy Olson's and Karis Delong's motions to sever, ECF No. 363.

5 **DISCUSSION**

6 Codefendants Tammy Olson and Karis Delong both premise their motions to  
7 sever on the basis that Defendant Smith would provide exculpatory testimony as to  
8 those two Codefendants in a separate trial. *See, e.g., United States v. Mariscal*,  
9 939 F.2d 884, 885 (9th Cir. 1991).

10 There exists a preference in the federal system that codefendants jointly  
11 charged should be jointly tried. *E.g., United States v. Hernandez-Orellana*, 539  
12 F.3d 994, 1001 (9th Cir. 2008). Federal Rule of Criminal Procedure 8(b) provides  
13 for joinder of two or more defendants if the defendants "are alleged to have  
14 participated in the same act or transaction, or in the same series of acts or  
15 transactions, constituting an offense or offenses." However, a court may sever  
16 defendants' trials under Federal Rule of Criminal Procedure 14(a) where joinder  
17 "appears to prejudice a defendant."

18 When joinder was originally proper under Rule 8(b), "a district court should  
19 grant a severance under Rule 14 only if there is a serious risk that a joint trial  
20 would compromise a specific trial right of one of the defendants, or prevent the

1 jury from making a reliable judgment about guilt or innocence.” *Zafiro v. United*  
2 *States*, 506 U.S. 534, 539 (1993). “Rules 8(b) and 14 are designed ‘to promote

3 economy and efficiency and to avoid a multiplicity of trials, [so long as] these

4 objects can be achieved without substantial prejudice to the right of the defendants

5 to a fair trial.” *Id.* at 540 (quoting *Bruton v. United States*, 391 U.S. 123, 130

6 (1968)) (alteration in *Zafiro*).

7 One basis for ordering separate trials is when a codefendant will provide  
8 exculpatory testimony at another defendant’s separate trial. *E.g., Mariscal*, 939  
9 F.2d at 885. In considering a request for severance on this ground, the court must  
10 weigh such factors as “the good faith of the intent to have a codefendant testify, the  
11 probability that the testimony will materialize, the economy of a joint trial, the  
12 possible weight and credibility of the predicted testimony, and the degree to which  
13 the predicted testimony is exculpatory.” *United States v. Cuozzo*, 962 F.2d 945,  
14 950 (9th Cir. 1992) (citing *Mariscal*, 939 F.2d at 885)). The predicted testimony is  
15 not sufficiently exculpatory where it would merely be favorable to the moving  
16 defendant; rather, the predicted testimony must instead be “substantially  
17 exculpatory.” *Mariscal*, 939 F.2d at 886 (quoting *United States v. Ford*, 870 F.2d  
18 729, 732 (D.C. Cir. 1989)). “A showing that the testimony would merely  
19 contradict portions of the government’s proof is insufficient.” *Id.* The test for  
20

1 severability on this ground is “stringent.” *United States v. Reese*, 2 F.3d 870, 892  
2 (9th Cir. 1993).

3 Codefendants Tammy Olson and Karis Delong contend that their trials must  
4 be severed from that of Defendant Smith because Defendant Smith can provide  
5 exculpatory evidence that could not otherwise be presented without his testimony,  
6 and that Defendant Smith likely would invoke his Fifth Amendment right to  
7 remain silent if called to testify at a joint trial. Specifically, Codefendants Tammy  
8 Olson and Karis Delong point to Count One of the Indictment, which charges all  
9 Defendants with engaging in a conspiracy “with the intent to defraud or mislead  
10 the United States and its agencies,” in violation of 18 U.S.C. § 371. As the  
11 Codefendants point out, § 371 criminalizes only willful intent. *United States v.*  
12 *Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989). Codefendants Tammy Olson and Karis  
13 Delong contend that Defendant Smith can testify that they did not act willfully,  
14 because they were not privy to the communications that Defendant Smith had with  
15 attorneys and consultants, or with the FDA, regarding the continued sale of MMS.

16 In support of their argument, Codefendants point to emails between  
17 Defendant Smith and his previous attorney Nancy Lord. Defendant Smith has  
18 asserted that he is entitled to attorney-client privilege as to these emails. The  
19 emails, which were obtained by a search warrant and screened by the  
20 Government’s screening team, were ordered by the Court to be provided to the

1 Codefendants in discovery pursuant to the Government's *Brady* obligations. The  
2 Court has considered the substance of these emails in ruling on the Codefendants'  
3 motions to sever.

4 In addition, Defendant Smith filed a declaration in which he stated that he  
5 will provide testimony at the separate trial of his Codefendants "whether such trial  
6 may precede or follow" his own. ECF No. 357 at 2. Defendant Smith stated that  
7 he would testify that neither Tammy Olson nor Karis Delong was privy to the  
8 general business dealings of his company. *Id.* at 4, 13. Defendant Smith also  
9 states that he would testify that Tammy Olson worked remotely and was  
10 responsible for dealing with customers and third-party companies fulfilling the  
11 packaging and shipping of MMS. *Id.* at 3-4. According to Defendant Smith, Ms.  
12 Olson's "set duties and responsibilities were extremely limited and did *not* include  
13 regular ordering, purchasing, receiving, manufacturing, bottling, labeling,  
14 production inspection, or shipping of materials, nor was [she] involved in any of  
15 the technical, legal, or financial affairs of [Smith's company]." *Id.* at 4.

16 As to Karis Delong, Defendant Smith would testify that she has spent the  
17 last decade tending to and home-schooling the three children whom she has raised  
18 with Defendant Smith. *Id.* at 11. According to Defendant Smith, Ms. Delong "had  
19 the least involvement in PGL of any of the co-defendants," and that where her  
20 name does appear in connection with financial transactions, "the transaction was

1 [in almost every instance] made exclusively by [Defendant Smith] without  
2 [Codefendant Delong's] knowledge or involvement.” *Id.* Defendant Smith would  
3 additionally testify that Codefendant Delong did not manage any business finances  
4 and “thus had no reason to know what purchases were being made or for what  
5 purpose”; that Codefendant Delong “never played any real managerial or decision  
6 making role in the [business]”; that Codefendant Delong told Defendant Smith on  
7 “numerous occasions” that she was “not interested in being involved in the  
8 business”; and that even though Defendant Smith would forward business-related  
9 emails to Codefendant Delong, she had told him “on more than one occasion” that  
10 “she rarely read what I forwarded” and would admit to him on some occasions that  
11 she did not even open an email he had forwarded to her. *Id.* at 11-13.

12 Defendant Smith also would apparently seek to offer character testimony  
13 regarding his Codefendants, including that “they would never do anything to harm  
14 another individual and never, knowingly, willfully, or intentionally break the law,  
15 let alone defraud the government.” *Id.* at 10. Defendant Smith offers that in his  
16 view that the evidence he has seen in discovery does not support the charges  
17 against his codefendants. The Court finds that such testimony is not likely to be  
18 admissible at trial.

19 For its part, the Government concedes that the good faith of the intent to  
20 have a codefendant testify and the probability that the testimony will materialize

1 are two factors weighing in favor of severance. *See Mariscal*, 939 F.2d at 885.  
2 However, the Government contends that the remaining factors each weigh against  
3 severance. The Government argues that severance should not be granted because  
4 Defendant Smith plans to testify on largely inadmissible matters; the admissible  
5 testimony that Defendant Smith will offer is not credible; and Defendant Smith's  
6 planned testimony is not substantially exculpatory, especially in light of the  
7 evidence that the Government will introduce at trial.

8 According to the Government, evidence will be introduced at trial  
9 demonstrating that Codefendants Olson and Delong were aware of FDA warnings  
10 regarding the safety of MMS; that the FDA had inspected and seized MMS from  
11 contractors; that the FDA had provided Defendant Smith with warnings regarding  
12 the legality of his actions; that Codefendant Olson was aware of the execution of  
13 multiple search warrants including one executed at her then-husband's company  
14 during the course of the criminal investigation; and that Codefendant Olson  
15 continued to market and sell MMS through her own website even after the search  
16 warrants were executed.

17 The Government further contends that the economy of a joint trial weighs  
18 heavily against severance because at least ten government witnesses reside out of  
19 district and because witnesses' memories may fade and evidence may spoil as  
20 numerous trials are conducted. Finally, the Government contends that

1 Codefendants could obtain their evidence through other sources, including by  
2 subpoenaing attorney Nancy Lord or other persons with whom Defendant Smith  
3 consulted, or by testifying on their own behalf.

4 The Government additionally contends that Defendant Smith has placed  
5 restrictions on his offer of testimony. *See United States v. Gay*, 567 F.2d 916, 919-  
6 20 (9th Cir. 1978) (holding that the trial court did not abuse its discretion “in  
7 refusing to accede to [a codefendant’s] conditional offer to present exculpatory  
8 testimony”). The Court notes that although Defendant Smith stated that he would  
9 testify regardless of whether his trial or the Codefendants’ trial came first that he  
10 could assert a Fifth Amendment privilege if his trial precedes the trial of his  
11 Codefendants. ECF No. 357 at 2.

12 In considering all of the relevant factors, the Court concludes that severance  
13 on the grounds identified by Coefendants Tammy Olson and Karis Delong is not  
14 warranted. To succeed on the grounds identified, the Codefendants must show that  
15 Defendant Smith’s planned testimony would be “substantially exculpatory.”  
16 *Mariscal*, 939 F.2d at 886. “A mere assertion of ultimate fact is not substantially  
17 exculpatory.” *United States v. Taren-Palma*, 997 F.2d 525, 533 (9th Cir. 1993)  
18 (citing *Ford*, 870 F.2d at 730-32), *overruled on other grounds by United States v.*  
19 *Shabani*, 513 U.S. 10, 11 (1994).

1       Although Defendant Smith proffers testimony that Codefendants Tammy  
2 Olson and Karis Delong played only limited roles in the MMS distribution scheme  
3 and were thus unaware of the possible illegality of their actions, his supporting  
4 affidavit is contradictory on this point. For example, Defendant Smith proffers that  
5 “Ms. Olson’s limited duties afforded her no reason or occasion to receive, buy, or  
6 conceal Sodium Chlorite, let alone be aware of any such importation,” ECF No.  
7 357 at 5, yet Defendant Smith concedes that Tammy Olson dealt with customers  
8 purchasing MMS and that her duties “occasionally included speaking with  
9 representatives of [third party fulfillment companies who packaged and shipped  
10 MMS] in order to locate lost or missing orders.” *Id.* at 3. Moreover, Defendant  
11 Smith concedes that Tammy Olson’s then-husband, Codefendant Chris Olson,  
12 bottled MMS for the same company where Tammy Olson was employed as a  
13 “member care” representative dealing with purchasers of MMS. *Id.* at 8.

14       As to Codefendant Karis Delong, Defendant Smith would testify that she  
15 “had the least involvement in PGL of any of the co-defendants.” *Id.* at 11. Yet  
16 Defendant Smith also admits that a PayPal account, a web domain, and a bank  
17 account, all tied to the selling of MMS, were operated in Karis Delong’s name. *Id.*  
18 Defendant Smith also admits that Karis Delong appeared as a managing member  
19 on LLC documentation for a company selling MMS. *Id.* at 12. According to  
20 Defendant Smith, Ms. Delong additionally “reluctantly covered for [him]” when he

1 left town for a business trip and “picked up product for me from the manufacturer  
2 once or twice and may have attended [] meeting[s] with [him].” *Id.* at 12.  
3 Defendant Smith additionally concedes that he forwarded numerous “business-  
4 related email[s]” to Karis Delong, but contends that she “rarely read what I  
5 forwarded.” *Id.* at 13.

6 Apart from Defendant Smith’s affidavit, the Government also states that it  
7 intends to introduce evidence contradicting Defendant Smith’s characterization of  
8 Codefendants Tammy Olson’s and Karis Delong’s roles in the company. For  
9 example, the Indictment alleges that Karis Delong “was a managing member of  
10 PGL who frequently handled financial transactions for PGL,” and used multiple  
11 email addresses “to communicate with co-conspirators, suppliers, and other  
12 individuals associated with MMS and PGL.” *Id.* at 4. The Indictment further  
13 alleges that Tammy Olson “established the website purestreamhealth.com after  
14 federal agents executed search warrants at various locations in Spokane,  
15 Washington, related to the production and shipping of MMS,” and that Ms. Olson  
16 used the purestreamhealth.com website to “continue[] marketing and selling MMS  
17 to consumers.” *Id.* at 15.<sup>3</sup>

18 \_\_\_\_\_  
19 <sup>3</sup> Although an Indictment is not evidence, the Government has indicated that it  
20 intends to introduce evidence backing up these charges at trial, including troves of  
electronic communications obtained through a warrant on the Defendants’  
associated Google accounts.

1 Therefore, Defendant Smith's mere assertions that Codefendants Tammy  
2 Olson and Karis Delong did not have knowledge of the MMS scheme are  
3 insufficient to establish that his testimony would be substantially exculpatory,  
4 especially in light of his accompanying statements that contradict that proposition.  
5 The planned testimony offered by Defendant Smith could be viewed as inculpatory  
6 as it is exculpatory, and the exculpatory components of his testimony would  
7 merely contradict portions of the Government's evidence, which is not sufficient to  
8 support severance. *See United States v. Pitner*, 307 F.3d 1178, 1181-82 (testimony  
9 is not "substantially exculpatory" where it "refutes only portions of the  
10 government's case, and leaves unaffected other evidence sufficient to convict")  
11 (citing *Reese*, 2 F.3d at 892).

12 Nor does Codefendants Tammy Olson's and Karis Delong's reliance on  
13 privileged communications between Mr. Smith and his counsel, Nancy Lord,  
14 establish that severance is appropriate or that they would have access to  
15 substantially exculpatory evidence at their separate trials. Codefendants Tammy  
16 Olson and Karis Delong assert that Defendant Smith had communications with  
17 Nancy Lord regarding the legality of PGL's actions and that Defendant Smith  
18 either did not communicate his conversations with Ms. Lord to his Codefendants or  
19 that he misrepresented the substance of these communications to his Codefendants.  
20 However, in Defendant Smith's declaration submitted in support of the motions to

1 sever he states that he would testify that he “relayed [his] reliance upon” Ms. Lord  
2 and other supposed legal experts “to co-defendants Tammy Olson and Karis  
3 Delong.” ECF No. 357 at 21. Defendant Smith has not said that he would testify  
4 that he withheld advice given to him by Ms. Lord regarding the legality of PGL’s  
5 actions. Similarly, the mere inclusion of any emails by Ms. Lord at separate trials  
6 would not be relevant as to whether Codefendants Olson and Delong were aware,  
7 or unaware, of their content.

8 The economy of joint trials also weighs heavily against severance. It is  
9 apparent that separate trials would be entirely duplicative as the same evidence  
10 would be introduced and the same witnesses would testify at separate trials of  
11 Defendant Smith and his Codefendants. The concern for judicial economy is “an  
12 important factor militating against severance” in this case. *Reese*, 2 F.3d at 892.

13 The Court additionally notes that Defendant Smith’s planned testimony  
14 would not appear to bear substantial weight or credibility. As discussed above,  
15 Defendant Smith will seemingly contradict himself as he seeks to portray the  
16 Codefendants as having a very limited role in PGL while admitting that they in fact  
17 had substantial involvement in at least some areas and instances, including dealing  
18 with shippers, bottlers, and suppliers. In addition, Defendant Smith has  
19 longstanding personal relationships with both Codefendants Tammy Olson and  
20 Karis Delong that may minimize the weight of his testimony. However, the Court

1 does not place much reliance on this factor because it is ultimately the jury's  
2 function to determine the weight and credibility of any testimony given at trial.

3 The Court concludes that Codefendants Tammy Olson and Karis Delong's  
4 motions to sever should be denied because they have not met the necessary  
5 condition of showing that Defendant Smith will offer substantially exculpatory  
6 testimony if the trials are severed. In addition, judicial economy would not be  
7 served by separate trials.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Defendant Tammy Olson's Motion to Sever Defendant, **ECF No. 317**, is  
10 **DENIED**.

11 2. Defendant Karis Delong's Motion to Sever Defendant, **ECF No. 318**, is  
12 **DENIED**.

13 3. Defendant Karis Delong's Ex Parte Motion, **ECF No. 355**, is **DENIED**.

14 **IT IS SO ORDERED.**

15 The District Court Clerk is directed to enter this Order and provide copies to  
16 counsel and to pro se Defendant Smith.

17 **DATED** this 3rd day of September 2014.

18 \_\_\_\_\_  
19 *s/ Rosanna Malouf Peterson*  
20 ROSANNA MALOUF PETERSON  
Chief United States District Court Judge